sum of money, the obligations of all parties to the instrument, as in the case of an ordinary bill of exchange, being based upon general personal credit. Should an instrument contain words purporting actually to assign the whole or part of a particular fund, it would not be a check at all, but an instrument of an entirely different character. In like manner it would seem that to construe the order contained in a check as an assignment of a particular fund is to deny the very existence of the instrument as a check. In short, it is believed that before certification the only obligation entered into by the bank is with the customer. This contracted obligation is to honor the customer's checks to the amount of his account; and for a breach, the bank, on any sound legal principle, becomes liable to the drawer, and to the drawer only. The holder, however, is clearly not denied an adequate remedy; for until certification the drawer is liable upon his contract to pay the amount of the check in case the banker refuses, and on certification the banker himself enters directly into a contract with the holder.

The question under consideration arises also upon the bankruptcy of the drawer. Were the check-holder really an assignee, he would be allowed, though he had never presented the instrument, to come in as a secured creditor. But, according to the better view, represented by *Dickinson* v. *Coates*, 79 Mo. 250, the check being regarded as a bill of exchange, the holder is compelled to prove with the general creditors. Again, were the check an assignment, it should have priority over a subsequent attachment or garnishment, though not presented until after service of process upon the debtor. The recent case of *McIntyre* v. *Farmers' and Merchants' Bank*, 73 N. W. Rep. 233 (Mich.), however, seems clearly right in regarding this position as untenable.

The assignment theory seems to have been adopted in Scotland and in many of the continental countries, but is not law in England or in most of the American jurisdictions. Its validity is distinctly denied in the Negotiable Instruments Law recently enacted in several of the States.

RECENT CASES.

BILLS AND NOTES — INNOCENT ALTERATION — EQUITY JURISDICTION. — *Held* where the alteration of a promissory note, though made by the holder, is prompted by honest motives, the instrument retains its legal validity, and a bill in equity will lie to recover the amount due thereon. *Wallace* v. *Tice*, 51 Pac. Rep. 733 (Oreg.).

That the holder of a note which has been innocently altered may restore its original condition and sue thereon at law, is well settled in the United States. *Horst* v. *Wagner*, 43 Iowa, 373. This being so, the ground for equity jurisdiction is, as the Oregon court admits, doubtful. But see 2 Daniell, Neg. Inst., § 1411. The reason assigned for entertaining the suit is that the aid of equity was necessary for purposes of discovery. But this is no adequate cause for assuming jurisdiction over a legal right which is amply protected at law. Bispham, Equity, § 565. Otherwise equity would give relief in every case of a legal cause of action. The notion, however, is quite prevalent in America, and especially where, as in this case, the bill is founded on one of the great heads of equity jurisdiction, as mistake, or fraud.

BILLS AND NOTES — UNCERTIFIED CHECK — ASSIGNMENT. — *Held*, that an uncertified check does not constitute an equitable assignment *pro tanto* of the fund against which it is drawn. *McIntyre* v. *Farmers' and Merchants' Bank*, 73 N. W. Rep. 233 (Mich.). See NOTES.

CONFLICT OF LAWS — DIVORCE — RE-MARRIAGE. — A Pennsylvania statute forbids a husband divorced for adultery from marrying the paramour during the life of his former wife. *Held*, a marriage in Maryland to evade this statute is void in Pennsylvania. *In re Stull's Estate*, 39 Atl. Rep. 16 (Pa.). See NOTES.

CONFLICT OF LAWS — WILLS — RES JUDICATA. — Testator, domiciled in North Carolina, devised lands situated there and in Connecticut. *Held*, the decision of the North Carolina court that the will worked an equitable conversion of the land was not *res judicata* as to the land situated in Connecticut. *Appeal of Clarke*, 39 Atl. Rep. 155 (Conn.).

A judgment or decree of a foreign court is binding only on that which is within its jurisdiction. *Carpenter* v. *Strange*, 141 U. S. 316. The State within which the land devised is situated is the only one that has the right and power to declare how the land shall pass under the will. *Robertson* v. *Pickrell*, 109 U. S. 608. The interpretation of a devise, therefore, is for the courts of that State only, *Staigg* v. *Atkinson*, 144 Mass. 564, and their decisions can have no extra-territorial effect. *McCartney* v. *Osburn*, 118 Ill. 403, accord.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — CONTROL BY A STATE. — Section 1308 of the Code of Iowa, forbidding limitation by contract of a carrier's common-law liability, was applied by an Iowa court to a contract of interstate commerce, the court holding the carrier to full liability for an accident occurring within the State. *Held*, that as so applied the statute is not unconstitutional as an attempt to regulate interstate commerce. *Chicago, M. & St. P. Ry. Co.* v. *Solan*, 18 Sup. Ct. Rep. 289. See NOTES.

CONTEMPT OF COURT — DEFENCE OF TRUTH OF PUBLICATION. — *Held*, that when an editor is charged with contempt of court for contradicting a judge as to the falsity of one of the editor's publications, and is not allowed to prove the truth of such publication, he has been denied the constitutional right to be heard in his own defence *McClatchy* v. *Superior Court*, 51 Pac. Rep. 696 (Cal.). See NOTES.

CONTRACTS — LIFE INSURANCE — SUICIDE. — The insured party, under a policy of life insurance, committed suicide when of sound mind. *Held*, that there could be no recovery on the policy. *Ritter* v. *Mutual Life Ins. Co.*, 18 Sup. Ct. Rep. 300. See NOTES.

CORPORATIONS — RIGHT TO PREFER CREDITORS. — *Held*, that the assets of an insolvent corporation do not constitute a trust fund for ratable distribution among all its creditors; and hence in the absence of statute such a corporation may prefer a creditor who is not a stockholder. *John V. Farwell Co.* v. *Sweetzer*, 51 Pac. Rep. 1012 (Col.).

This is a well considered case, in accordance with the weight of authority. The cases *contra* seem hardly justifiable, even if the results are commendable on grounds of policy. The policy against corporate as well as against individual preferences should be left to the legislature. Judicial legislation is perhaps justifiable at times. As suggested in 2 Am. Law Reg. & Rev. N. S. 448, the courts under cover of the "trust fund theory" have gone so far in developing the "status" of a stockholder, with attending duties of paying up the capital stock, waiving rights of set-off and preference, etc., that the only reasonable plan is to complete the development by further judicial legislation. The rule in the principal case, however, does not interfere with this development, and a contrary rule would constitute an exception to the idea of a corporation as a legal person having powers similar to those of an individual. The law of corporations has been gradually simplified by the recognition of this idea, and if now the courts turn about and introduce exceptions without the aid of the legislature, confusion would probably result. Cf. 9 HARVARD LAW REVIEW, 481, and 10 HARVARD LAW REVIEW, 248.

CRIMINAL LAW — EXTRADITION — LOCALITY OF OFFENCES. — One accused of poisoning resulting in death in Canada, may be extradited, although the poison, if administered at all, was given in New York. *Sternaman* v. *Peck*, 83 Fed. Rep. 690.

This question was argued on an application for a rehearing; and, doubtless for this reason, was only briefly discussed. Conceding the right of a sovereign to pass laws punishing the causing of death within his territories even where the "mortal blow" was received in a foreign State, and assuming that the Canadian government has exercised this right (although this latter is certainly doubtful), we still have the question whether the alleged offence is within the present extradition treaty with Great Britain. U. S. Stats. at Large, vol. 26, pp. 1508–11. The language of the treaty avoids the difficulty, which has been raised under Art. 4, § 19, of the Federal Constitution, that the accused has never fled from the foreign State. See *Jones* v. *Leonard*, 50

Iowa, 106. But it applies only to a list of specified offences; and of these murder is the only one under which the offence charged can possibly fall. But the crime of murder at common law was certainly not committed in Canada; and since in a treaty between Great Britain and the United States, technical terms would probably be interpreted in accordance with their common-law signification, it may be doubted whether the accused committed in British territory any extraditable offence. However, the tendency in modern times is towards a liberal construction of such treaties. *Benson* v. *McMahon*, 127 U. S. 457; 1 Moore on Extradition, § 97.

EVIDENCE — ADMISSIBILITY — UNLAWFUL OBTAINING. — *Held*, that the fact that evidence is obtained by an unwarranted and unlawful seizure of defendant's property does not render such evidence inadmissible. *Williams* v. *State*, 28 S. E. Rep. 624 (Ga.).

The rule adopted in the principal case has not infrequently been attacked, but is everywhere law. 1 Greenleaf on Evidence, § 254a. However reprehensible may be the conduct of parties securing evidence by unfair or illegal means, the only question before the court is the validity of the evidence presented. *Legatt* v. *Tollervy*, 14 East, 302. If not otherwise objectionable, it cannot be rejected because the means by which it was obtained were questionable. *Com.* v. *Dana*, 2 Met. 329. Analogous to this is that class of cases where a confession has been obtained by holding out a hope of advantage. Though the confession itself is inadmissible, facts discovered as a result of the confession are admissible. *King* v. *Warickshall*, Leach, 263.

EVIDENCE — DECLARATIONS OF INTENTION. — *Held*, that in an action to set aside a will for undue influence, the declarations of the beneficiary charged with exerting the undue influence are admissible, where the will was in accord with such declarations. *Perrett* v. *Perrett*, 39 Atl. Rep. 33 (Pa.).

Where intention is a material fact, it may be proved by declarations of the party, where such declarations are not too remote in point of time. *Com.* v. *Trefethen*, 157 Mass. 180. If, in the principal case, there had been nothing in evidence but the will and the declarations of intention, the relation of the declarations to the issue of undue influence would have been too conjectural to make their admission proper. But there was a large body of evidence tending to show undue influence. Under such circumstances, the corroborative evidence of intention seems rightly admitted. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285.

EVIDENCE — OPINION — DECLARATIONS TO A PHYSICIAN. — A physician, testifying as to the physical condition of the plaintiff at a certain date, stated that he based his opinion upon an examination and upon the history he received from the family. *Held*, that his opinion should be entirely excluded, as he could not base it to any extent upon the statements of third parties made to him out of court. *Chicago, etc. R. R. Co.* v. *Sheldon*, 51 Pac. Rep. 808 (Kan.).

It is well settled that a physician cannot give an opinion based wholly on statements made to him out of court by parties other than the one whose condition is in issue. This is so although such parties are the physicians attending the patient. Rog. Exp. Test., § 47; *Heald* v. *Thing*, 45 Me. 392. The principal case carries this doctrine to its full extent, and the authorities indicate that it would be followed. *Wetherbee's Ex'rs* v. *Wetherbee's Heirs*, 38 Vt. 454. It is said that as the declarations of the third parties would not be admissible in any case, an opinion based on such incompetent evidence should be excluded. This reasoning, however, appears to be unsound. The opinion of a physician is admitted because of his experience and skill, and his own judgment and ideas are desired; therefore it does not necessarily follow that his testimony should be rejected because his reasoning is founded upon information which would be incompetent as evidence by itself. *Whitney* v. *Thacher*, 117 Mass. 523. The doctrine of the principal case appears to be an over-refinement, and would result in excluding practically all testimony as to an internal disease where the patient is unable to explain his own condition.

INTERNATIONAL LAW — FOREIGN SOVEREIGN — COUNTER-CLAIM. — A foreign sovereign brought suit in England to restrain defendants from using a fund in their hands in certain ways. Defendants set up a claim for damages. *Held*, that while a sovereign suing in England submits to the jurisdiction for the purposes of allowing discovery in aid of the defendant in his action, he does not submit to what is in its real nature a cross-action. *So. African Rep.* v. *La Compagnie Franco-Belge, etc.*, [1898] 1 Ch. 190.

This is the first time the point has been decided, but the rule laid down seems sound. A sovereign is not subject to the jurisdiction of another country, even though he is travelling there under an assumed name. *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149. He may consent to the action, or he may himself bring suit. *United States* v. *Wagner*, L. R. 2 Ch. 582. If he sues, he submits to whatever belongs to that

suit, such as defences of payment, etc., and discovery; otherwise the result would frequently be to give him a right where in reality none existed. *United States* v. *Prioleau*, 2 H. & M. 559. Before the Judicature Acts in England the matter here set up must have been made the basis of a distinct suit. Under such a rule, defendant could not have sued the sovereign. The change in procedure has wrought no change in substance. There are still two distinct actions, consolidated for convenience into one final judgment. Dicey, Conflict of Laws, 213.

PARTNERSHIP — BANKRUPTCY — DOUBLE PROOF. — A firm gave a note, signed by it and one of the partners. The firm and the partners became bankrupt. *Held*, the holder is entitled to receive a dividend from the firm assets, and then a dividend from the separate assets, but only on the balance of his claim after deducting the amount of the firm dividend. *Ives* v. *Mahoney*, 73 N. W. Rep. 720 (Minn.).

The rule prohibiting double proof where the creditor holds the obligation both of the partnership and a partner existed in England, *Ex parte Bevan*, 10 Ves. 107, till abrogated by 32 & 33 Vict. c. 71, § 37. It has always been considered unsound and unjust (Eldon, L. C., in *Ex parte Bevan*, *supra*), and is opposed to the authority in this country, Parsons on Partnership, 390, with one exception, *Fayette Nat. Bank* v. *Kenney*, 79 Ky. 133. As to the amount provable, if a dividend has been already paid by one estate, proof of the balance only will be allowed against the other; but where the dividends are to be simultaneous, it is the better opinion that the proof may be against both estates for the whole. *Matter of Farnum*, 6 Boston L. R. 21; Ames's Cases on Partnership, 356.

PARTNERSHIP — DISSOLUTION WHEN INSOLVENT. — A firm consisting of three partners dissolved, and one partner conveyed his interest to the other two, who carried on the business. Both the old and the new firms were insolvent at the time of the dissolution, though it does not appear that the partners had knowledge of it. *Held*, for reasons which make such knowledge immaterial, that as to the old firm creditors the dissolution was ineffective, and the assets of the old firm were subject to their claims. *Franklin Sugar-Refining Co.* v. *Henderson*, 38 Atl. Rep. 991 (Md.).

The decision is sound. *Darby & Co.* v. *Gilligan*, 33 W. Va. 246. The court relies on the "partners' equity" theory, by which so many courts reach results which are sound from a business point of view. The correctness of the case seems to depend on the mercantile theory of a partnership, which, though not formally recognized by the courts, is often indirectly applied. *Menagh* v. *Whitwell*, 52 N. Y. 146. The important point in the principal case is that the court makes the question of the validity of the dissolution turn, not on the actual good or bad faith of the partners, but on the fact of insolvency at the time of dissolution. The dissolution was in effect an assignment by the old firm to the new firm; and the new firm being insolvent, its assumption of the old firm's debts was not consideration for the assignment. The assignment, therefore, like a voluntary assignment by an insolvent individual, was invalid. See *contra*, *Howe* v. *Lawrence*, 9 Cush. 553.

PARTNERSHIP — REALTY — CONVERSION INTO PERSONALTY. — Real estate was purchased by a firm. One partner deeded his interest to the other to manage for the firm, and on a dissolution to pay over to the grantor or his representatives such portion as should belong to him. *Held*, as between the partners and their representatives, the deed operated as a conversion of the realty into personalty. *Darrow* v. *Calkins*, 49 N. E. Rep. 61 (N. Y.).

There is a square difference of opinion whether realty held by a firm is to be treated *ipso facto* as converted into personalty. The American cases, of which the opinion in the principal case approves, holding that there is no such conversion, rest on the partners' equity theory, that the property retains its character unless there is need to sell it to adjust the partners' equities. *Shearer* v. *Shearer*, 98 Mass. 107. The English cases, opposed to this view, rest on the doctrine that the only interest of the partner in the firm property is his right to the surplus after the assets have been turned into money and the liabilities paid off. *Darby* v. *Darby*, 3 Drew. 495; Ames's Cases on Partnership, 177; Lindley, Partn., 3d ed., 690. But all courts recognize the limitation that the partners can settle the character of the property by agreement. In England they can prevent its conversion into personalty. *Steward* v. *Blakeway*, L. R. 4 Ch. App. 603. In America they can convert the realty into personalty. *Maddock* v. *Astbury*, 32 N. J. Eq. 181; Parsons, Partn., §§ 271, 272.

PERSONS — ALIMONY — IMPRISONMENT FOR DEBT. — *Held*, that an imprisonment for contempt for a refusal to pay alimony is not in violation of a statute forbidding imprisonment for debt. *State* v. *King*, 22 So. Rep. 887 (La.).

In some jurisdictions a decree for alimony is regarded as an ordinary debt of record for many purposes. It has been held that such a decree gave the wife a vested right

which could not be forfeited or altered, *Kamp* v. *Kamp*, 59 N. Y. 212; that a claim for unpaid alimony survived the death of the wife, and could be recovered by her administrator, *Miller* v. *Clark*, 23 Ind. 370; or could be enforced against the husband's estate after his death, *Knapp* v. *Knapp*, 134 Mass. 353; that such a claim was within the statute discharging insolvent debtors, *Beach* v. *Beach*, 29 Hun, 181; and also within the protection of the statute against conveyances in fraud of creditors, *Tyler* v. *Tyler*, 126 Ill. 525; *Plunkett* v. *Plunkett*, 114 Ind. 484. Still, the principal case is in accord with the authorities upon the precise question presented. *Ex parte Perkins*, 18 Cal. 64; *Pain* v. *Pain*, 80 N. C. 325. The duty to pay alimony is not properly a debt. It is not an obligation to pay a definite sum of money at all events, but is a mere personal duty resting upon the husband to provide for the support of his wife. Moreover, a decree of court does not make this obligation a judgment debt, since such decree is afterward subject to alteration and control at the discretion of the court granting it. 2 Bishop, Mar., Div. & Sep. § 829 *et seq.*

PRACTICE — VERDICT BY INCOMPETENT JURORS. — In a criminal case, where one of the jurors rendering the verdict was unable to read and write the English language, as required by statute, but defendant, by failure to examine said juror, was ignorant of his incompetency till after verdict, *held*, that defendant had waived his right to challenge. *State* v. *Pickett*, 73 N. W. Rep. 346 (Iowa). See NOTES.

PROPERTY — ADVERSE POSSESSION. — One in adverse possession attempted to buy in the outstanding title. His agent presented him with what appeared to be a deed from the true owner, but the signature had been forged by the agent. *Held*, the attempted purchase did not operate to divest the possession of its adverse character. *Oldig* v. *Fisk*, 73 N. W. Rep. 661 (Neb.).

A grandfather conveyed land to his grandchild by deed given to the father, who entered and held possession for twenty years after the child had become of age, but concealed the existence of the deed. The child discovering the deed, entered, and the father brought ejectment. *Held*, he had acquired no title by prescription. *Parker* v. *Salmons*, 28 S. E. Rep. 681 (Ga.).

The essence of adverse possession is that the holder occupies not under but in opposition to the right of the true owner. *Dietrich* v. *Noel*, 42 Ohio St. 21. By the better opinion, color of title is not necessary, nor even the belief that the claim is well founded in law or in fact. *Alexander* v. *Pendleton*, 8 Cranch, 462. The test is whether the true owner could have brought an action against the holder during the period. In the first case the question whether the possession was adverse came up squarely, and its decision rests on sound principle and is in accord with the weight of authority. 1 Am. & Eng. Enc. Law, 839. In the second case, although a parent can hold adversely to his child after its majority, *Den* v. *Lane*, 2 N. J. Law, 397, the father's claim was rightly defeated. Whatever might be the rights of an innocent party holding adversely to an owner who is ignorant of the existence of his title, it is clear that one fraudulently concealing such existence would not be allowed to profit by his own wrong.

PROPERTY — COVENANT AGAINST INCUMBRANCES — STATUTE OF LIMITATIONS. — *Held*, the Statute of Limitations does not begin to run on a covenant against incumbrances until the ultimate damage has been suffered. *Seibert* v. *Bergman*, 44 S. W. Rep. 63 (Tex.).

By the weight of American authority, the covenant against incumbrances is broken, if at all, as soon as made, and therefore does not pass to an assignee. *Greenby* v. *Wilcocks*, 2 Johns. 1. According to this view, the Statute of Limitations should commence running immediately. But by thus compelling the grantee to sue without waiting for actual damage, he is generally allowed only nominal compensation; and if he is subsequently damnified, hardship will result. Rawle on Covenants, 5th ed., § 188. The English courts, by means of the fiction of a continuing breach, allow this covenant to run with the land until actual damage. *Kingdon* v. *Nottle*, 4 M. & S. 53. The only English authorities on the question when the period of limitations begins to run are the conflicting opinions of Baron Bramwell and Chief Baron Kelly, in *Spoor* v. *Green*, L. R. 9 Ex. 99. In all of the American States in which *Kingdon* v. *Nottle*, *supra*, has met with approval, it is conceived that the Statute would commence running only upon the occurrence of the ultimate damage. *Post* v. *Campan*, 42 Mich. 90. After the decision in the principal case, it seems to follow *a fortiori* that *Kingdon* v. *Nottle* must be approved in Texas.

PROPERTY — FIXTURES — RENEWAL OF LEASE. — *Held*, that ordinary trade fixtures placed on the premises by the tenant and removable without material injury do not pass to the landlord by the act of renewing the term. *Smusch* v. *Kohn*, 49 N. Y. Supp. 176 (Sup. Ct., App. Term).

Earlier New York decisions have held the other way where the fixtures are in the nature of large structures or buildings attached directly to the land. *Loughvan* v. *Ross*, 45 N. Y. 792. The principal case refuses to extend the doctrine to store fixtures, although the weight of authority applies this rule to all fixtures. Amos & F., Fixtures, 159; *Watriss* v. *Cambridge, etc. Bank*, 124 Mass. 571. The principal case states the better view, and sound reasoning would demand that it be extended to all cases. *Herr* v. *Kingsbury*, 39 Mich. 150. Although technically the acceptance of a new lease is equivalent to a surrender of the premises, the actual possession is never divested, and so long as possession is retained the opportunity of removal should remain. To require the tenant to detach fixtures at the beginning of each new term is to discourage the improvements which it is the policy of the law to foster.

PROPERTY — FRAUDULENT CONVEYANCE — NOTICE BY POSSESSION. — A, being considerably in debt, bought land and had the title made out to B, but entered into possession and occupied the premises himself. Later B mortgaged the property to C, who had no knowledge of A's interest. *Held*, that the mortgage was good against A, whether A's conduct was fraudulent or not. *Alliance Trust Co.* v. *O'Brien*, 51 Pac. Rep. 640 (Oreg.).

Undoubtedly, as the court says, if A had acted fraudulently C's claim must prevail. This, however, is not on the ground that C was misled by A's improper conduct, as the court puts it, but because A could not enforce any claim even against B, since one who asks relief in equity must come with clean hands. *Bartlett* v. *Bartlett*, 14 Gray, 277. But the court also says that even if A had acted in good faith, C should be protected as a *bona fide* purchaser, and relies on cases which hold that a vendor who has put on record a deed absolute on its face cannot set up the fact that he continued in possession as notice to a purchaser from his grantee of equities reserved. The authorities are about evenly divided on this point, but there is much to be said in favor of these cases. It may be that the suspicions aroused by continued possession by the vendor would naturally be satisfied by an examination of the records, but this and other arguments in favor of the above cases apply with little or no force to the present case. It is by no means analogous, and the general rule should be applied that possession is at least presumptive notice of right to possession.

PROPERTY — HIGHWAYS — DEDICATION. — *Held*, that where a road is laid out by a county and uninterruptedly used by the public for a period of eleven years, without objection from the owner of the land, an intention to dedicate will be presumed. *Whittaker* v. *Ferguson*, 51 Pac. Rep. 980 (Utah). See also *Evansville & T. H. R. R. Co.* v. *State*, 49 N. E. Rep. 2 (Ind.).

In order that the public may acquire a right over land by dedication, it must first be shown that there was an intention on the part of the owner to dedicate his land to public uses. Angell on Highways, § 142. Just what evidence will be deemed sufficient is not entirely clear on the authorities. Mere user, without more, short of the statutory period is probably not sufficient. 3 Kent's Commentaries, 451. On the other hand, a much shorter period is enough, where there are other facts tending to show an intention to dedicate. *Jarvin* v. *Deane*, 3 Bing. 447, where the time was five years. In the principal case, the user for eleven years, coupled with the apparent abandonment of the land by the owner, and the entire reliance of the public thereon, seems sufficient to sustain the decision. *Cincinnati* v. *White*, 6 Pet. 431.

PROPERTY — MORTGAGE DEED — ACCEPTANCE. — A mortgage was executed by a debtor to a creditor and delivered to the clerk for registration without the knowledge of the creditor. After it was recorded the creditor accepted it. *Held*, that the mortgage must be postponed to a judgment obtained meanwhile by another creditor. *Evans* v. *Coleman*, 28 S. E. Rep. 645 (Ga.).

Ever since the famous case of *Thompson* v. *Leach*, 2 Vent. 198, it has been the settled law in England and in nearly all our States that a deed takes effect upon delivery to a third person for the grantee's use, if ever accepted by him. Either acceptance is presumed from the beneficial nature of the transaction to the grantee or by the better view historically a conveyance by deed is rather unilateral in its nature, passing title upon delivery, subject to defeasance by refusal to accept on the part of the grantee. The court in the principal case rejects this whole doctrine and follows *Welch* v. *Sackett*, 12 Wis. 243, in holding that a deed is of no effect until accepted. While admitting that acceptance usually relates back, it holds that this cannot be allowed where the rights of a judgment creditor intervene. Notice of the mortgage from the record should make no difference, as it is notice of an incomplete transaction. It is like notice of a deed drawn up, but not yet executed. Granting the court's premises the conclusion seems correct. *Contra* to the principal case are *Buffum* v. *Green*, 5 N. H. 71, and *Merrills* v. *Swift*, 18 Conn. 257.

PROPERTY — QUIT-CLAIM DEED — ESTOPPEL BY RECITALS. — Two of the three children of a man who was supposed to be dead, quit-claimed the part of his land in question to plaintiff, the third child, each grantor describing himself as one of the three heirs of the father. The latter actually died four years later, and soon after his death the above grantors conveyed the same land by warranty deed to defendant, a purchaser in good faith. *Held*, that plaintiff had the better title. *Hagensack* v. *Castor*, 73 N. W. Rep. 932 (Neb.).

The case shows how far many courts will go in applying the doctrine of estoppel by deed. There were no covenants whatever in the quit-claim deeds, and all that could be called a recital of an estate conveyed were the words, "being one of the three heirs of G. H. Ohler." Yet in order to apply the doctrine of estoppel the court seized on these words as showing that a fee was intended and understood to be conveyed, and that therefore title ought to pass at once to the grantee as soon as the grantors acquired title by the death of the ancestor, just as if there were a warranty of title. This is applying and extending the doctrine of *Van Rensalaer* v *Kearney*, 11 How. 297. See also Rawle on Covenants, 5th ed., §§ 247, 248. As between the parties to a deed the justice of the result is evident, but here a *bona fide* purchaser is cut out. This result, however, is probably due to the unfortunate form of statute in Nebraska, which provides that an after-acquired title shall inure to the grantee in an earlier deed, without protecting a later *bona fide* purchaser from the grantor.

PROPERTY — STATUTE OF LIMITATIONS — PUBLIC USE. — A lot had been dedicated by the city of San Francisco for certain public purposes, the fee remaining in the city. Plaintiff remained in possession under a claim of right for the statutory period. *Held*, that he had acquired no title by the Statute of Limitations. *Home for Care of Inebriates* v. *City and County of San Francisco*, 51 Pac. Rep. 950 (Cal.).

It is a maxim of the common law that lapse of time does not bar a sovereign's rights. The ground of this is that laches cannot be imputed to the sovereign, whose time and attention are engrossed by great public duties. But because of the hardship which often resulted, grants were sometimes presumed where possession had been long and continuous. *Crimes* v. *Smith*, 12 Co. 4; *Roe* v. *Ireland*, 11 East, 280. Municipalities are the agents of the State for the purposes of government, and many courts hold that they also are excluded from the operation of the Statute, as in the principal case. *Kopf* v. *Utter*, 101 Pa. St. 27. But the reason of the maxim does not exist here, for the protection of public rights of this nature is one of the very duties for which municipal corporations are instituted, and officers are appointed for that purpose. While rights of importance may sometimes be lost by holding them within the Statute, such a result is justified by the necessity for the security of titles, — the policy at the base of all Statutes of Limitations. *Wheeling* v. *Campbell*, 12 W. Va. 36. See Dillon, Mun. Corp., 4th ed., § 675, for his view (approved in a few cases) that while not within the Statute, municipalities may be estopped from disputing title where equity and justice require.

SALES — IMPLIED WARRANTY. — When a retail dealer sells meat for immediate consumption, there is an implied warranty of wholesomeness, and the buyer who is injured by eating it may recover damages. *Wiedeman* v. *Keller*, 49 N. E. Rep. 210 (Ill.). See NOTES.

SALES — INFRINGEMENT OF PATENT. — A trader in England ordered goods from a foreign manufacturer in Switzerland to be sent by post to England. The goods were manufactured according to an invention protected by an English patent. *Held*, that the vendor had not made, used, exercised, or vended the invention within the ambit of the patent, and that the patentee had no right of action against the vendor for an infringement of the patent. *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works*, [1898] A. C. 200.

The case is in line with the better decisions in this country under the liquor laws, and illustrates the same principles. See 11 HARVARD LAW REVIEW, 468.

TORTS — DUTIES OF LANDOWNERS — CONTRIBUTORY NEGLIGENCE. — Plaintiff owned a house situated about sixty feet from a railroad track, which house was covered with poplar shingles and had a valley extending from the top toward the roadway. In an action against the railroad for negligently setting fire to the house, *held*, that plaintiff was not guilty of contributory negligence by allowing dry leaves to accumulate in the valley. *Louisville, etc. R. R. Co.* v. *Malone*, 22 So. Rep. 897 (Ala.).

The authorities are divided upon the general question whether an owner of land adjoining a railroad track is guilty of contributory negligence in case of a fire if he has allowed combustible material to accumulate upon his premises, but the majority support the principal case. Thompson, Neg., 163–169. This seems to be the sound view.

Kellogg v. *C. & N. W. R. R. Co.*, 26 Wis. 223. A landowner has the right to use his property in the natural and ordinary way, at least where he does not cause injury to others by so doing. To hold that he is obliged to change the conduct of his affairs on account of the possible negligence of another, would be to encourage carelessness and would often give the negligent proprietor control of the neighborhood. A holder of property in an exposed situation must take his risks from accidental conflagrations, but it is difficult to find in the mere facts of ownership and passive occupation the necessary illegal or negligent act to bar his recovery for the tort of another. *Fero* v. *Buffalo, etc. R. R. Co.*, 22 N. Y. 209. *Contra, Ohio, etc. R. R. Co.* v. *Shanefelt*, 47 Ill. 497.

TORTS — IMPUTED NEGLIGENCE. — The plaintiff was the conductor of a horse-car. Through the concurring negligence of the driver and the servant of the defendant, the car and the defendant's cart collided and the plaintiff was injured. *Held*, the negligence of the driver was not imputable to the plaintiff. *Hobson* v. *New York Condensed-Milk Co.*, 49 N. Y. Supp. 209 (Sup. Ct., App. Div., Second Dept.).

When two persons are engaged in a common enterprise and there is a joint management of affairs, there is a mutual responsibility for each other's acts. *Beck* v. *East River Ferry Co.*, 6 Robt. 82. However, as the jury found that the plaintiff had no control over the driver as to the manner of driving, the present case would not fall within that principle. It seems to be an illustration of the well-settled rule that the negligence of one person is not to be imputed to another merely because both of them are engaged in a common enterprise, when neither has control in fact, or by reason of superior authority over the conduct of the other. *Cray* v. *Philadelphia, etc. Ry. Co.*, 23 Blatch. 263; *Elyton Land Co.* v. *Mingea*, 89 Ala. 521. And it makes no difference that the plaintiff and the driver were fellow-servants of the same master, inasmuch as the action was brought against a third person and not against the master. *Galvin* v. *Mayor*, 112 N. Y. 223.

TORTS — MENTAL SHOCK — PROXIMATE CAUSE. — Through the negligence of the defendant an incandescent lamp fell upon the plaintiff, causing a slight bruise upon her temple. She was also frightened and suffered a severe shock which resulted in a miscarriage. *Held*, the plaintiff could recover for the effects of the shock. *Jones* v. *Brooklyn Heights Ry. Co.*, 48 N. Y. Supp. 914 (Sup. Ct., App. Div., Second Dept.).

Courts have refused to allow recovery where physical damage has resulted from fright caused by negligence, when there was no physical contact. *Mitchell* v. *Rochester Ry. Co.*, 151 N. Y. 107; *Spade* v. *Lynn, etc. Ry. Co.*, 168 Mass. 285; *Kalen* v. *Terre Haute, etc. Ry. Co.*, 47 N. E. Rep. 694 (Ind.). It has been said there could be no recovery in such a case because the negligence complained of was not the proximate cause of the damage. *Victorian Ry. Com'rs* v. *Coultas*, L. R. 13 App. Cas. 222. But this doctrine has been much criticised. See 10 HARVARD LAW REVIEW, 387. The true reason for denying recovery under such circumstances probably rests upon the theory that there has been no breach of a legal duty. Courts refuse to recognize a duty because in practice it is impossible to administer any other rule satisfactorily. *Spade* v. *Lynn, etc. Ry. Co.*, *supra*. There was, however, a breach of a legal duty in the principal case, since there was negligent contact with the plaintiff, and hence mental shock and its effects naturally resulting from that breach should be elements in the damages recovered. See Sedgwick, Elements of Damages, 104.

TORTS — TRESPASS — PLEA OF JUDGMENT AGAINST CO-TRESPASSER. — *Held*, that a plea in trespass that plaintiff had recovered judgment against a co-trespasser is sufficient without averring satisfaction of the judgment. *Petticolas* v. *City of Richmond*, 28 S. E. Rep. 566 (Va.).

Although recognizing that the weight of authority in America is *contra*, the court considered itself bound by two Virginia cases decided about a century ago. It also cites the language of the court in *Brinsmead* v. *Harrison*, L. R. 7 C. P. 552, to show the view of prominent English judges as to the common-law doctrine on the subject. The opinion of Miller, J., in *Lovejoy* v. *Murray*, 3 Wall. 1, seems to be a complete answer to those English judges. The early Virginia cases were decided before the leading English cases and before *Lovejoy* v. *Murray*, and although some of the old authorities were discussed, the subject was by no means thoroughly treated. The deference paid to these old cases, therefore, seems to be somewhat extreme. See 3 HARVARD LAW REVIEW, 326–328.